

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Telephone Number Portability) CC Docket No. 95-116
)
Petition of GTE Pacifica, Inc. for Waiver and)
Extension of Time to Implement Wireless)
Local Number Portability in the)
Commonwealth of the Northern Mariana)
Islands)

To: The Deputy Chief, Spectrum and Competition Policy Division, Wireless
Telecommunications Bureau

**PETITION FOR RECONSIDERATION
OF MICRONESIAN TELECOMMUNICATIONS CORPORATION**

Micronesian Telecommunications Corporation (“MTC”), the incumbent local exchange carrier (“ILEC”) in the Commonwealth of the Northern Mariana Islands (“CNMI”), by its attorneys and pursuant to Section 1.106 of the Commission’s rules, hereby petitions for reconsideration of the Division’s Order denying PTI Pacifica, Inc. (formerly known as GTE Pacifica, Inc.) (“PTI”), an affiliated wireless carrier, a waiver and extension of time to implement local number portability (“LNP”) capability.¹ The Division erred in conditioning PTI’s right to a waiver on MTC’s implementation of costly LNP-related upgrades that MTC is not otherwise required to implement at this time.

¹ *Telephone Number Portability, Petition of GTE Pacifica, Inc. for Waiver and Extension of Time to Implement Wireless Local Number Portability in the Commonwealth of the Northern Mariana Islands*, CC Docket No. 95-116, Order, DA 07-1565 (April 2, 2007) (the “Order”).

I. MTC HAS STANDING TO CHALLENGE THE ORDER

As described in detail below,² the Order would impose substantial and unlawful costs and burdens upon MTC. As a result, MTC is a “person aggrieved or whose interests are adversely affected” by the Order.³ MTC is thus statutorily entitled to seek reconsideration.⁴

11. THE DIVISION ERRED IN IMPOSING BURDENSOME OBLIGATIONS ON MTC

PTI and MTC operate in the CNMI, a three hundred mile archipelago located approximately 6,000 miles from the continental U.S. CNMI’s population of approximately 80,000 people is spread primarily over the islands of Saipan, Tinian and Rota. In the CNMI more than half of the population consists of non-U.S. citizens who, in turn, constitute over 77 percent of the labor force on Saipan and work predominantly in low-wage occupations.⁵ In 1999, the median per capita income in CNMI was only 42.4 percent of the U.S. average.⁶ The CNMI has also recently lost two significant industries.

As described in the Petition, PTI is interconnected with the other Commercial Mobile Radio Service (“CMRS”) carriers in the CNMI only indirectly through the switch of the ILEC, MTC. At present, MTC has not upgraded its own switch to provide LNP capability because it is not required to do so. MTC has not yet received a BFR from a wireline carrier, and its obligation to implement intermodal porting is subject to a judicial stay. Moreover the required upgrades present far too significant a cost burden on a small entity like MTC to justify from a cost-benefit

² See *infra* Section II.

³ 47 U.S.C. § 405(a).

⁴ *Id.*

⁵ The federal minimum wage laws do not apply in the CNMI; the minimum wage set by local CNMI law is \$3.05 per hour.

⁶ See U.S. Census Bureau, 2000 Census, American Finder, available at <www.census.gov>.

perspective. Specifically, the LNP costs to be borne by MTC are subject to federal jurisdiction but are not eligible to be recovered under the Commission's cost-recovery rules. These costs are especially burdensome in light of the small population and unique demographics of the CNMI described above. In the U.S. as a whole, wireless churn rates average only between 1.5% and 3.0%. This average churn rate coupled with the small and itinerant population of the CNMI suggests that the number of wireless-to-wireless ports likely would be relatively few in comparison to the costs to be borne by MTC without a cost recovery mechanism.

Until MTC's switch is LNP-capable, the interconnected CMRS carriers, including PTI, cannot port numbers with one another. As a result, it is currently impossible for PTI (or any other CMRS carrier in the CNMI) to provide LNP. PTI thus established "good cause" for a waiver based on a showing of "special circumstances warrant[ing] a deviation from the general rule" that would "serve the public interest."⁷ Therefore, the Division should have granted PTI a waiver until such time as MTC is required to deploy LNP capability.

The Order incorrectly concluded that, "because [PTI] and MTC are under common control," the Division could "hold [PTI] and [their common parent company] responsible for delay in the implementation of LNP arising out of MTC's inaction."⁸ The Division cites nothing in the Commission's rules to support its exercise of purported delegated authority to mandate (indirectly or otherwise) costly facilities upgrades by a wireline ILEC (MTC) in order that the ILEC's subsidiary (PTI) is not subject to enforcement. The Division's Order found that grounds

⁷ See 47 C.F.R. § 1.3; *Northeast Cellular Telephone v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969, *cert. denied*, 409 U.S. 1027 (1972)). See also generally Petition at 2.

⁸ Order at ¶ 11.

were lacking for PTI's waiver because of *MTC's* inaction.' Indeed, in order for PTI and the other CMRS carriers in the CNMI to be able to port numbers among themselves, MTC essentially would need to make its own network LNP capable," at a cost that cannot be justified.

Moreover, MTC is a separate corporation from PTI and, as an ILEC, is subject to a different regulatory regime from PTI. While PTI, as a wireless carrier, is generally subject to a deregulated federal regime," MTC, as an ILEC, is subject to price-cap regulation as to its interstate rates and to the jurisdiction of the CNMI authorities for its intrastate rates. MTC has obtained estimates from switching and signaling vendors suggesting that MTC will incur non-recurring costs of approximately \$125,000 to upgrade its switching and routing capabilities and \$3,000 in additional monthly costs in order to permit PTI and the other interconnected CMRS carriers to port numbers among themselves. These upgrades constitute virtually all of the upgrades that MTC would need to implement in order to provide intermodal portability for itself. Given that MTC has a diminishing number of access lines (MTC has lost 10 percent of its access lines within the past year due to a downturn in the economy), these costs would impose on MTC a significant burden that neither the Division nor the Commission has attempted to justify.¹²

The full Commission, moreover, has never required ILECs that are not otherwise subject to LNP requirements to implement technology upgrades in order to facilitate wireless-to-wireless

⁹ The Division stated: "MTC has not made diligent efforts to prepare for porting. To the contrary, it apparently has taken no action. The special circumstances that we relied on in *TeleGuam* therefore do not exist here." Order at ¶ 11 (internal citations omitted).

¹⁰ See Petition at 2-4.

¹¹ See *generally* 47 U.S.C. § 332(c).

¹² The Commission has not conducted such a cost-benefit analysis because it has not adopted a requirement that an ILEC must implement upgrades, without a cost-recovery mechanism, to facilitate wireless-to-wireless LNP.

porting among interconnected CMRS carriers.¹³ Tellingly, the Commission *has* imposed other LNP-related obligations on non-LNP-capable carriers, *but not the obligation at issue here*. For example, after Federal Register notice and comment, the Commission required non-LNP-capable carriers, when they are the “N-1” carrier in the routing chain, to perform the database queries necessary to route calls properly to ported numbers,¹⁴ but did not impose the obligation to upgrade facilities to permit other, interconnected carriers to provide LNP.

It makes economic sense that the Commission would have imposed the routing obligation on non-LNP capable carriers but not the requirement to facilitate LNP for interconnected carriers. As the Commission recognized, non-LNP-capable carriers may enter into arrangements with other carriers to perform the required routing queries, such that the non-LNP capable carrier does not need to implement the full portability upgrade necessary to perform the queries itself.¹⁵ MTC cannot, however, simply “contract away” the software and signaling functions it would need to perform to permit the interconnected CMRS carriers to provide LNP. To comply with the Division’s Order, MTC would incur virtually the entire cost of its own LNP implementation.

Because the Commission, in its notice-and-comment rulemaking proceedings establishing carriers’ LNP-related obligations, has never imposed the obligation at issue here, it is beyond the Division’s power to do so for a number of reasons.

¹³ The *Division* suggested in a footnote in a similar, earlier case that it would hold a wireless carrier and its parent responsible for any inaction on the part of an affiliated ILEC, but nevertheless granted the waiver. *Petition of TeleGuam Holdings, LLC, et al.*, CC Docket No. 95-116, Order, 20 FCC Rcd 16323, 16327 n.28. That discussion of the affiliate-responsibility issue was unexplained *dictum* and similarly in error. PTI, moreover, lacked standing to challenge the *TeleGuam* decision.

¹⁴ *Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 7236, 7277 ¶ 69 (1997).

¹⁵ *Id.*

A. The Order Violated the APA's Notice and Comment Requirements

The Order represents a new substantive rule that cannot be imposed without following the notice-and-comment requirements of the Administrative Procedure Act ("APA").¹⁶ In the past, the Commission has properly established through notice-and-comment rulemaking ILECs' obligations to provide LNP to other requesting carriers, and to properly route calls to ported numbers even where the ILEC is not itself subject to an LNP obligation. The Commission has also established wireless carriers' LNP obligations, and established a waiver framework where it is impossible or impracticable for the wireless carrier to meet the rules' strictures. The full Commission has never, however, required ILECs to implement costly technology upgrades in order to facilitate interconnected CMRS carriers' LNP obligations, and it has never addressed whether a CMRS carrier's affiliation with the ILEC affects the ILEC's responsibilities where the CMRS carrier's ability to implement LNP depends upon the ILEC's capabilities. The D.C. Circuit has held that "new rules that work substantive changes, or major substantive legal addition[s], to prior regulations are subject to the APA's procedures."¹⁷ By imposing a considerable burden on MTC as a result of its affiliation with PTI, and by denying PTI a waiver based on its affiliation with MTC, the Order worked substantive changes and major substantive legal additions to the Commission's LNP rules.¹⁸ Because the APA's requirements were not followed, the Order is invalid.

¹⁶ 5 U.S.C. § 553. See also generally *USTelecom Ass'n v. FCC*, 400 F.3d 29, 34-36 (D.C. Cir. 2005).

¹⁷ *USTelecom*, 400 F.3d at 34-35 (internal citations and emphasis omitted).

¹⁸ "[F]idelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid [the APA's] requirements by calling a substantive regulatory change an interpretive rule." *Id.* at 35.

B. The Order Violated Cost Recovery Principles

As noted above, the Order would require MTC to implement virtually the entire upgrade necessary to open its own numbers to porting. The Order states that it “would not require MTC to port any numbers.”¹⁹ If, however, MTC follows the letter of the Division’s Order and implements the necessary LNP upgrades but does not port its own customers’ numbers, it will be ineligible for the cost recovery mechanism that the Commission has provided for ILECs implementing LNP, as the Commission permits cost recovery “only when and where [customers] are reasonably able to begin receiving the direct benefits of long-term number portability.”²⁰ This imposition on MTC of the obligation to implement LNP technology without a cost recovery mechanism would contravene the Commission’s determination, in implementing the Act’s LNP provisions, that it must provide for equitable federal cost recovery of the costs of LNP.²¹ The Division cannot expect MTC to recover these costs through its local rates, as this would constitute unlawful federal encroachment on intrastate rates.²²

C. The Order Exceeded the Division’s Delegated Authority

The Order imposed a new substantive rule, as discussed above, but the Bureau lacks rulemaking authority.²³ In addressing the impact of the affiliation between PTI and MTC upon the two carriers’ respective LNP-related obligations, it also addressed a “new or novel question[] of law or policy which [could] not be resolved under outstanding Commission precedents and

¹⁹ Order at ¶ 12.

²⁰ *Telephone Number Portability*, CC Docket No. 95-116, Third Report and Order, 13 FCC Rcd 11701, 11776 ¶ 142 (1998).

²¹ *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8460 (1996).

²² 47 U.S.C. § 152(b).

²³ 47 C.F.R. § 0.331(d).

guidelines.”²⁴ Further, in imposing a substantive obligation on MTC, a wireline ILEC, the Order stepped beyond the Division’s subject matter jurisdiction over *wireless* telecommunications.²⁵

D. The Order Interferes With the D.C. Circuit Stay

Contrary to the Order’s conclusion, the Order also squarely contravenes the purpose of the stay imposed by the D.C. Circuit.²⁶ The purpose of the stay in *USTelecom* was to preclude the Commission from imposing the substantial costs of LNP implementation on small ILECs like MTC without first conducting the required analysis of whether the benefits outweigh the costs. The Court found that, without “an explanation for the rejection of alternatives designed to minimize significant economic impact on small entities,” it had no alternative but to stay enforcement of the LNP requirement on small entities like MTC pending the Commission’s completion of the required analysis.²⁷ Although over two years have elapsed since the Court’s decision, the Commission has not conducted the requisite analysis to determine whether the imposition of these costs on small entities like MTC is justified.

The Order makes much of the fact that the *USTelecom* case dealt with the “intermodal” porting requirement that ILECs port numbers with CMRS carriers,²⁸ rather than an obligation to support wireless-wireless porting among interconnected CMRS carriers. But this distinction has no practical significance in this case. As noted above, in order to permit PTI and the other

²⁴ 47 C.F.R. § 0.131(a)(2).

²⁵ See generally 47 C.F.R. § 0.131. Although WTB has delegated authority to address “matters concerning wireless carriers that also affect wireline carriers in cooperation with the Wireline Competition Bureau,” 47 C.F.R. § 0.131(a), the sweeping obligation imposed in the Order exceeds this ancillary grant of jurisdiction as there is no evidence that the Division acted “in cooperation with” WCB in adopting the Order.

²⁶ Order at ¶ 12; See also *USTelecom Ass’n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005).

²⁷ *USTelecom*, 400 F.3d at 43.

²⁸ Order at ¶ 12.

interconnected CMRS carriers to deploy wireless-wireless portability, MTC must acquire at significant expense and implement virtually all of the same switch software and signaling system upgrades that would be necessary to prepare itself for intermodal porting. If, as the Court concluded, the Commission has failed to perform the cost-benefit analysis necessary to determine whether these costs can justifiably be imposed on small entities like MTC in the intermodal porting context, then clearly the Commission has failed to perform the necessary analysis for the imposition of those same costs in the context of an ILEC's facilitating wireless-wireless porting among interconnected CMRS carriers (especially since the full Commission has never addressed the latter issue).

It is similarly irrelevant to the purpose of the *USTelecom* stay that the present case does not implicate costs for transporting calls to ported numbers at different locations.²⁹ The Court imposed the stay because the Commission had failed to consider “*the initial costs of implementation and the continuing costs of transporting calls to ported numbers.*”³⁰ The Order would impose virtually the full initial costs of LNP implementation on MTC without the cost-benefit analysis required by the Regulatory Flexibility Act.³¹ It thus would violate the *USTelecom* stay.

²⁹ See Order at n.46.

³⁰ *USTelecom*, 400 F.3d at 42 (emphasis added).

³¹ Indeed, because transport costs are not an issue in the insular environment of the CNMI, the factual distinction that the Division seeks to draw between intermodal and wireless-wireless porting has even less relevance on the facts of this case. In the CNMI, MTC's costs to provide intermodal porting and its costs to facilitate PTI's wireless-wireless porting are more similar than they might be in the continental U.S.

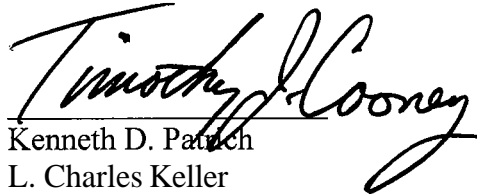
CONCLUSION

The Division's Order erred in concluding that PTI was not entitled to an extension of its LNP obligation because of its dependence on MTC, which is not yet required to provide LNP. The required upgrades present a significant cost burden on a small entity like MTC that would not withstand a cost-benefit analysis. The Order seeks to require MTC, a price-cap regulated ILEC over which the Division has no jurisdiction, to implement LNP technology, and does so without any basis in Commission's rules or Commission-level precedent, without a cost-recovery mechanism, and contrary to the *USTelecom* stay. The Order should thus be reconsidered, and PTI should be granted an extension based on its inability to implement LNP until MTC is required to do so in accordance with proper APA procedures.

Respectfully submitted,

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CERTIFICATE OF SERVICE

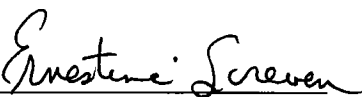
I, Ernestine Screven, do hereby certify that on this 2nd day of May, 2007, a copy of the foregoing petition for reconsideration was served by U.S. mail, first-class postage prepaid to the following:

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